No. 12,066

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN FOTOPULOS, minors, by and through their guardian ad litem, Diamond Fotopulos,
Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

THE FACTS.

On December 23, 1946 Peter Fotopulos, deceased, who was the husband and father of appellees, was driving his light Dodge truck north on Van Ness Avenue in San Francisco and as he approached the intersection of Van Ness Avenue and Bush Street, in the inner or westerly lane of traffic and next to and parallel to the street car tracks and safety zone he was following another car or truck that has never been identified. There are red and green signal lights at that intersection to regulate the traffic and at that in-

stant the red light was against traffic north and south on Van Ness Avenue and all such traffic was stopped. It was daylight and the streets were dry. After deceased halted behind the other car or truck, an army truck approached him from behind in the same lane of traffic, colliding with the rear of deceased's truck and forcing it against the car or truck in front of him. That car or truck, the first in the line, proceeded on its way as the green or go light flashed. Deceased's truck could not proceed. It was damaged both front and rear and buckled in the center and a tow car was called.

Peter Fotopulos, deceased, made no immediate complaint of physical injury to any one but did talk to the driver of the army truck and said that "the army would fix his truck for him." (Tr. 180.) This was testified to by Hammond, a witness for appellant.

Then the truck was towed away and deceased went home. He told his wife about the accident and stayed home the rest of the day. He complained of his stomach, could eat no solid foods, and attended to his business intermittently for about ten days, gradually growing worse until January 4, 1947 when he went to see Dr. Wertheim. No relief came to him and three days later Dr. Russell Ryan was called. Fotopulos entered the St. Francis Hospital, was operated on January 8th, and died on January 10th.

It was the opinion of Dr. Ryan, the attending and operating surgeon that deceased had received a blow in the abdomen on December 23, 1946, that a subse-

quent blood clot formed in one of the nutrient vessels of the colon wall and a necrosis followed causing death. We shall discuss the testimony of the medical witnesses later in this brief.

Deceased left surviving him his widow 29 years old and two chilrden of the ages of 9 and 10 years. According to the stipulation between counsel (Tr. 253) the widow had no separate estate or income and the net earnings of deceased for the year 1946 was $18,574.76.

Upon the trial without a jury before Hon. George B. Harris, District Judge, and after the case was submitted, the Court made oral findings for the record (Tr. 220, 221, 223) and concerning which we shall also later comment, and thereafter and following the taking of additional evidence regarding earnings of deceased, judgment was rendered against the defendant and appellant for $50,000.00.

THE EVIDENCE.

We shall endeavor to follow, in order, the statement of points relied upon by appellant although they may better be summarized into three headings, namely:

1. Was appellant guilty of negligence free from contributory negligence of deceased?

2. Was the injury the cause of death?

3. Were the damages excessive?

I.

The Negligence.

An army sergeant, Bailey, was driving the army truck and he had three occupants with him; a corporal and a private who were riding in the rear facing east and a female nurse riding on the seat with him and to his right.

The evidence of Bailey was presented to the Court by deposition and in that deposition he testified as follows:

> Q. As you approached Bush Street did anything happen?
>
> A. Yes, plenty.
>
> Q. Will you state what happened?
>
> A. Well I hit the back of another vehicle. Now I cannot give a definite description of it. It has been quite a while since then. (Tr. 127.)

Thereafter Bailey stated there was another truck ahead of him but he didn't pay much attention to it, that he was in the left lane and that deceased was in the right lane and cut from the right lane into the lane in front of him. (Tr. 128.)

He also stated he didn't notice the stop sign, that he didn't get that far before the other vehicle (deceased) cut in front of him. Thereafter he testified that he could not estimate the speed of the Dodge truck (deceased) because he *never saw the truck.* (Italics ours.) "You cannot see much from a side view of the car. By that time he was right in front of me." (Tr. 133.)

Then Bailey stated that the right front corner of the army truck struck the left rear corner of the Dodge truck. (Tr. 133.) Yet no damage was done to either of the rear fenders of the Dodge.

And thereafter, and this is more of Bailey's testimony, he stated as follows:

> Q. I am asking you where the truck was when Mr. Fotopulos hit it after you hit Mr. Fotopulos, that is all I am asking you.
>
> A. That would only commit me. (What he meant by that answer we cannot tell.) I do not know whether he hit the truck. He might have hit it before I hit him.
>
> Q. You do not know what happened?
>
> A. I do not know. I hit him, that is all I know. (Tr. 147.)

Further in his deposition Bailey stated it was impossible to see the stop lights on Van Ness Avenue and the stop light could not be seen because a lamp post obstructed the view. (Tr. 161.)

Regarding this stop light may we interrupt the testimony of Bailey for a moment to quote from the oral findings of the Court as follows:

> "A significant factor in the whole case, as I view it, is the stop signal, and this Court has driven that particular area many, many times. It is perfectly apparent to the Court, and was at the time this accident took place, that that stop signal was perfectly visible, at least a block away. The driver's testimony that he could not see it, that it was screened by a street lamp, is not in accord with the facts." (Tr. 221.)

And Bailey, after struggling with statements and misstatements finally says:

Q. You do not remember very much about this accident at all?

A. Truthfully, I do not. (Tr. 146.)

May we follow excerpts of Bailey's testimony with the deposition of the corporal, Hammond? He was riding in the rear on a seat lengthwise with the army truck and facing the east. He was so confounded in his evidence that, although offered by appellant, it resulted in greater favor for the appellees.

Hammond testified before the coroner on January 23, 1947, just thirteen days after the death of Fotopulos and in his deposition appears the following:

Q. Corporal, you testified before the county coroner in this case, didn't you?

A. Yes.

Q. On the 23rd of January, 1947?

A. Yes.

Q. You were sworn by the coroner there to testify and answer questions?

A. Yes.

* * * * * * *

Q. Well could you see what happened in front of you?

A. I just looked over the cab and could see.

Q. And you saw his car pass you on which side?

A. On the *left side.* (Italics ours.) We were on the inside lane.

Q. Going north and he passed you on the left side of the army truck?

A. Yes. (Tr. 187, 188.)

Thereafter Hammond said he gave them (coroner) a statement but they could have "got it wrong" and "at the time this accident happened I never gave it a thought that anything was ever going to come up about it and just plumb forgot about it until about six months later I hear that he had died." (Tr. 189.) Yet Hammond had testified before the coroner thirteen days after Fotopulos died.

One more fact we desire to present about Hammond. And we again remind the Court that appellant contends that the army truck struck the left rear corner of the Dodge truck. But Hammond testified as follows:

> Q. Then you struck him on the left rear end, did you?
>
> A. Yes.
>
> Q. And he was then on an angle looking toward the northwest, wasn't he?
>
> A. Yes.
>
> Q. And after you hit him you mean to say the position of the truck changed so he was then resting at an angle and looking toward the north east?
>
> A. Yes. (Tr. 192, 193.)

He also testified that they stopped at the intersection of Bush and Van Ness for the red signal and that he was sure of that. (Tr. 184.)

Witnesses Harry A. Failor and Justin L. McNeil were in a store building on Van Ness directly opposite the collision. Failor testified they heard the crash and both of them ran out to see what happened.

A. As I got out there I noticed a Ford pickup truck in the pedestrian lane this side of the passenger zone and an army truck directly behind it.

Q. A Ford pickup truck?

A. A Ford pickup truck.

Q. Was that a Dodge?

A. Well, it could have been a Dodge as far as I know. It was a small pickup anyway.

Q. All right.

A. And the army truck was parked right behind it. * * * The fellow said, "Well my brakes didn't hold", or "I couldn't help it."

Q. The man who was driving the army truck said that?

A. Army truck. (Tr. 78.)

Q. And directly behind it (referring to the diagram on the blackboard) you have placed the army truck and the two are in parallel, or one is exactly ahead of the other, is that correct?

A. That's right. (Tr. 79.)

Justin McNeil testified:

Q. But were the two cars in an absolutely straight line with each other or was either car on an angle?

A. No, they were both one behind the other. (Tr. 89.)

II.

The Cause of Death.

We shall not linger on this point any longer than to quote from the testimony of Dr. Russell Ryan and to remind the Court that he was the only surgeon who treated, who operated and who attended the autopsy. The evidence he gave is so direct and positive that we

fail to understand why appellant has raised this question at all. Dr. Ryan testified as follows:

> A. My conclusion is that this patient, as he stated in his history, received a blow in the abdomen caused by striking the steering wheel in the accident. (Tr. 34.) That he had a subsequent clot form in one of the nutrient vessels of the wall of the colon, he had a necrosis following that and died as a result.
>
> Q. In other words, then, is it your opinion from all of the facts you know about this case, that the original trauma on the 23rd of December was the proximate cause of the condition which you found on operation, and of his death?
>
> A. Very definitely, yes.
>
> Q. You have no doubt about it in your mind?
>
> A. Not in my mind, there isn't any doubt. (Tr. 38.)

That practically concludes the medical testimony because while a couple of doctors testified for the appellant, they knew nothing about the case except from reading the medical reports and did not attempt to contradict the testimony of Dr. Ryan.

III.

The Damages.

Fotopulos, at the time of his death, was 49 years of age and his life expectancy was then 23.36 years. (Stip. Tr. 252.) Plaintiff widow had no separate property or income other than community (same stip.). He was not employed but was in business for himself. His net income during the year preceding his death was

$18,574.76. Considering such life expectancy, earning power and the widow and two minor children surviving him, the judgment of $50,000.00 was reasonable and fair.

Before we close this part of our brief may we suggest that we are somewhat confused over the statements at the bottom of page 12 and the top of page 13 of appellant's brief. It quotes from the transcript and the testimony of Mrs. Fotopulos concerning our objection to a question by appellant as to whether deceased carried certain accident and sickness policies. Our objection was properly sustained. Appellant now claims, for the first time, that the question was asked to lay a foundation for showing that Fotopulos had other sicknesses or accidents. But the matter was not further pursued by appellant nor did appellant at any time, in any part of the trial, ever inquire into the condition of the health of deceased nor did it ever attempt to show that deceased was in other than perfect health.

Then appellant urges that such question went to the amount of damages, and alleges that if the widow or children had received any insurance benefits, they could not recover. Surely appellee does not intend that this Court should take this to be the law. But even aside from this, appellant and appellee stipulated that appellees had no income other than from their community and this rules out any indemnity from any insurance policies, accidental or otherwise.

THE LAW.

I.

NEGLIGENCE.

We begin this section of our brief with a quotation from Section 1963 of the California Code of Civil Procedure on the question of presumptions. Subsection 4 of that section provides that the following presumption is satisfactory if uncontradicted: "That a person takes ordinary care of his own concerns," and this was quoted in a death case decided by our California Supreme Court in 1914, *Crabbe v. Mammoth Channel Gold Mining Co.,* 168 Cal. 500, 143 Pac. 714. In that case Mr. Justice Henshaw said:

> "Where death is occasioned under circumstances such as this, without eye witnesses, the law comes to the aid of the plaintiff who is pressing a suit for damages for the death and that law is found in the Code of Civil Procedure."
>
> "This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide."
>
> "Accordingly where personal injury or death is occasioned under circumstances which might import negligence, the presumption is that the one killed or injured did everything that a reasonably prudent person would have done under the circumstances for his own safety." 19 Cal. Jur. 703.

To the same effect are the decisions in the following cases:

Little v. Yanagisawa, 70 Cal. App. 303, 233 Pac. 357;

Smellie v. Southern Pacific Co., 212 Cal. 540, 299 Pac. 529;

Donovan v. Security Bank, 67 Cal. App. (2d) 845, 155 Pac. (2d) 856.

But the question of contributory negligence upon which appellant so securely relies was not determined by a jury but by a Court. And that Court ruled out any negligence of deceased contributing toward the collision. Our California Court in *Ramsey v. Posini,* 108 Cal. App. 527, 291 Pac. 884, 886 held as follows:

> "It is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury." Gregg v. Western Pac. R. R. Co., 193 Cal. 212, 225, 223 P. 553, 558.

In other words, even if a jury had decided against any contributory negligence, the Court would be slow in setting such verdict aside and much more weight is given to the decision of the Court than that of a jury.

Here we have a dispute of facts about the accident. But the evidence submitted by appellees was by disinterested witnesses, not prejudiced or biased, and it was their opinion and which the Court believed, that deceased was where he should have been at the time

and place of the accident and no act of his in any manner contributed to it.

Even if there had been some slight tangible evidence of negligence on the part of deceased, in jurisdictions in which the defendant bears the burden of proof as to contributory negligence, as in California, such burden may be satisfied by a preponderance of the evidence. *Diller v. Northern California Power Co.,* 162 Cal. 531, 123 Pac. 359.

> "In such case the defendant may avail himself of any evidence supplied by the plaintiff on the issue. It is not, however, necessary to a recovery that it appear from all the evidence that the decedent was guilty of no negligence proximately contributing to the injury." 16 American Juris. 223.

> "In most jurisdictions, when plaintiff makes out a prima facia case of negligence and does not, by his pleading or evidence, disclose contributory negligence on the part of deceased, the burden is on defendant to show contributory negligence on the part of deceased as a matter of defense." 17 Corpus Juris 1304-1305.

This is the well established California rule as set forth in

> *Williams v. San Francisco and Northwestern Ry. Co.,* 6 Cal. App. 715, 93 Pac. 122;
>
> *Schneider v. Market St. Ry. Co.,* 134 Cal. 482, 66 Pac. 734.

> "The fact that decedent cannot testify as to how the injury happened raises no presumption in favor of or against plaintiff in an action for his

> death, but less evidence is required to establish freedom from contributory negligence on his part than if he were alive and able to testify." 17 Corpus Juris 1308.

As we have heretofore stated, a person is charged with the duty of exercising ordinary care for his own safety and a presumption exists that such care was so exercised. After all, it has been repeatedly held that the question of whether or not due care was exercised and whether or not negligence of the deceased contributed to the accident is always one for the jury or in the absence of a jury, it would be decided by the Court.

This doctrine is well set forth in the decision of the U. S. Circuit Court of Appeals for the Seventh Circuit in 1940 in *Stephenson v. Grand Trunk Western,* 110 Fed. (2d) 401-410. In the opinion in that case Mr. Justice Major quoted from a Michigan case, *Fairchild v. Detroit etc.,* 250 Mich. 252, 230 N.W. 167 in which the Court used these words:

> "The presumption which prevails in the absence of testimony to the contrary that one accidentally killed was not guilty of contributory negligence is based on the common knowledge of mankind that one will ordinarily exercise such care as is requisite for his own safety."

We therefore respectfully urge the presumption that deceased was free from contributory negligence was not, in the opinion of the trial Court, overcome by sufficient evidence to deny the widow and children the right to recover for his death and such opinion should be sustained.

II.

THE DEATH WAS CAUSED BY THE INJURY.

No law can or should be cited upon this question. It is only a matter of the preponderance of the medical evidence and we refrain from indulging in a discussion of legal authorities upon a matter so elementary in its nature.

May we, for a moment, direct the Court's attention to such evidence, which, in our opinion, is overwhelming in support of our position.

Four doctors testified. One was called by the appellees and three by appellant. Of those three, one of them, Dr. Wertheim, was called by deceased on January 3, 1947, ten days after the accident. The patient gave a history to the doctor of the accident on December 23rd and told him he felt some kind of discomfort in his stomach. (Tr. 51.) The doctor advised rest and diet. That was all. And then counsel qualified the doctor as an expert and as such, and under direct examination by appellant the doctor testified as follows:

> Q. Oh, I understand you. In other words, if there is no other cause for the perforation of the bowel, then it must have been caused by the accident.
>
> A. Then it is more probable that it is caused by the accident. (Tr. 56.)

That was the testimony of the witness for appellant and we refrained from any cross-examination.

The two other doctors called by appellant were strangers to the case and based their opinions from

a reading of the medical pathological and autopsy reports. But Dr. Casper, who thought the man might have died from a carcinoma or diverticulum, finally did admit that in the absence of any such findings in the medical and other reports, the trauma might have been the cause of the death (Tr. 66) and Dr. Crahan, also for the appellant, testified on direct examination that there was no evidence of either cancer or diverticulitis and as follows:

> Q. Doctor, if the death was caused as indicated in this report, would that have been caused by a body—I mean by a person striking the upper part of his abdomen against a steering wheel?
>
> A. I couldn't say that. It might be the result of trauma. Is that what you are trying to ascertain? (Tr. 69.)

And again we did not cross examine.

We have already quoted from the testimony of Dr. Ryan and the evidence he gave was in full detail. The Court will note, without our repeating at length, that he fully described every condition he found, his tentative diagnosis before operation and just what he discovered after such operation. This was followed by the pathological examination and the autopsy, both of which fully sustained Dr. Ryan in his later and more complete diagnosis and his opinion of the cause of death. That opinion was direct, unequivocal and positive. It left no question of a doubt. Deceased sustained an injury on December 23, 1946, a blow on the abdomen, he had a subsequent clot form in one of the blood vessels of the colon, a necrosis followed and he died as a result. (Tr. 38.) No more need be said

concerning the medical testimony and the cause of death. There was no conflict.

III.

THE JUDGMENT WAS NOT EXCESSIVE.

At the outset may we again repeat to this Court that no question of passion or prejudice enters this case because there was no jury. Nor was any damage allowed for grief or mental suffering, and we fail to understand why appellant has injected that fact in its brief because there was no evidence and not one word in the entire trial touching upon that point. Of course the damages are limited to pecuniary loss and we fully agree with appellant. And we also agree that the Court is not bound by expectancy of life according to mortality tables. But such tables are admissible—as an aid to the Court and were admitted for just that purpose. *Gallentino v. Fierro,* 294 Pac. 59.

On the last page of appellant's brief it says something about his health and vigor and his being continually employed. Why does appellant mention employment? Deceased was never employed, not for many years prior to his death. He was an employer, not an employee and he was "in good health and vigor" (quoting from such last page of the opening brief.) Not one word of testimony indicated the contrary. His health was not even inquired into and in the absence of any contrary evidence the Court was bound to assume he was in good health.

Upon the question of the amount of the judgment can it be honestly urged that, in these days of higher costs, that such judgment was excessive considering the fact that deceased had a life expectancy of 23 years, that he was earning around $15,000 a year net and that he left a widow and two small children? Any number of California decisions sustain our judgment. For instance in *Krause v. Rarity,* 293 Pac. 62, a judgment of $35,000 for the death of a man 42 years old who earned, not $15,000 a year but about $3,600 a year, was held not excessive and that was in 1930, long before the cost of living had advanced.

And in 1947 this Court sustained a judgment for $20,000 for one child only, the parents having been divorced, and the deceased parent earned but $300 a month. *Southern Pacific Co. v. Zehnle,* 163 Fed. (2d) 453.

In that case Mr. Justice Denman said:

> "With regard to the amount to be awarded for such loss of society and comfort, in a recent case, in the reverse situation where the parents lost the society and comfort of their infant child ten months of age, the court sustained a jury award of $15,000. Couch v. Pacific Gas & Electric Co., 80 Cal. App. (2d) 183 P. (2d) 91. There as in all such cases, the jury was entitled to consider, as it did, the century's continued depreciation of the purchasing value of the dollar, with the extraordinary acceleration of the rate of decrease of the past decade. In California, such depreciation of the purchasing value of the dollar was recognized as a matter for the jury's consideration as early as 1928. O'Meara v. Haiden, 204 Cal. 354,

367, 268 P. 334, 60 A.L.R. 1381. * * * We recognize, as does the California law, the important part of the trial judge in determining a contention of excessive damages raised as here on motion for a new trial, which was denied. In Bond v. United Railroads, 159 Cal. 270, 285, 113 P. 366, 48 L.R.A. N.S. 687, Ann. Cas. 1912C, 50, the California Supreme Court said that the remedy for excessive verdicts 'is practically committed entirely to the judge who presides at the trial in the court below' and that the power of appellate courts over damages 'exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury'. See Hale v. San Bernardino, etc. Co., 156 Cal. 713, 716, 106 P. 83; Wheaton v. North Beach, etc., Co., 36 Cal. 590, 591. Practically, the trial court must bear the whole responsibility in every case."

CONCLUSION.

The accident out of which grew the claim of appellees resulted from the negligence of an employee of appellant, and no contributory negligence of deceased was involved. The judgment of the District Court upon the proof of negligence is proper and should be confirmed.

Death resulted from the blow on the abdomen suffered by decedent in the accident brought about by the negligence of appellant's employee. The evidence traced the cause of death from that blow through succeeding days of disability and suffering, through

necessary surgery and to the fatal outcome in decedent's death. The complete chain of events proved by appellees is continuous and unbroken and carries the cause of death directly back to the employee's negligence. In this particular the opinion of the trial judge is clear, positive, certain and judicious.

Nor may it with propriety be contended that the amount of damages which the judgment awarded appellees is excessive. No passion or prejudice entered into the trial or judgment in this cause to bring out an award of excessive damages. No question may be raised of an unduly influenced or excited jury. The cause was tried by the judge sitting without a jury. The trial was objective and impersonal. The Court was in a position and competent to properly evaluate the evidence as to the amount which would compensate the appellees for the loss of their husband and father. The amount awarded was determined by computation based on decedent's normal expectancy of life, his earning power and his surviving widow and children. The amount finally fixed and awarded is reasonable, is fair and is in accordance with the evidence and the facts.

It is respectfully submitted that the judgment of the District Court should be sustained.

Dated, San Francisco, California,
May 9, 1949.

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